

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**COLGATE SCAFFOLDING & EQUIPMENT CORP.  
Employer**

**- and -**

**CASE NO. 2-RC-23105**

**DISTRICT COUNCIL OF CARPENTERS  
OF NEW YORK CITY & VICINITY  
Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Colgate Scaffolding & Equipment, herein the Employer, constructs various kinds of scaffolding on buildings throughout New York City. The District Council for New York City and Vicinity United Brotherhood of Carpenters and Joiners of America, herein the Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to represent all of the Employer's employees, including the foremen, skilled and unskilled laborers, but excluding those employees excluded by the statute. The Employer contends that the only appropriate unit would include the foremen and the skilled laborers, but must exclude the non-skilled laborers in addition to all statutorily excluded employees.

Upon the petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter<sup>1</sup> and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated and I find that the Employer, a New York corporation with its principal office and place of business located at 1470 Bruckner Boulevard, Bronx, New York, is engaged as a contractor in the building of scaffolding and related services at construction sites in the City of New York. Annually in the course and conduct of its business operations, the Employer performs services valued at \$50,000 for general contractors which themselves are directly engaged in interstate commerce.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Petitioner a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. Petitioner in its petition seeks to represent all full-time and regular part-time sidewalk bridge and scaffold carpenters and erectors employed by the Employer, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act. The Employer contends that the petitioned-for unit is inappropriate because it combines the highly skilled employees (the foremen and the skilled laborers) with the non-skilled workers. In that regard, the Employer submits that

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<sup>1</sup> The briefs filed by the Employer and Petitioner herein have been duly considered.

these two groups of employees lack interchange due to the difference in skill levels which is also reflected in the wide discrepancy in their pay rates. Further, the Employer contends that the bargaining history and industry practice dictate that the unskilled workers be excluded from the petitioned-for unit.

I have considered the evidence and the arguments presented by the parties on the community of interest issue and as discussed below, I find that the wall-to-wall unit petitioned-for by the Petitioner is an appropriate unit. The record establishes that the unskilled employees are part of a highly integrated operation and their exclusion from the unit is not warranted.

To provide a context for my discussion, I will first provide an overview of the Employer's operations.

### **I. THE EMPLOYER'S OPERATIONS AND STRUCTURE**

The Employer primarily installs and dismantles sidewalk bridges which are structures that allow pedestrians to walk safely on the sidewalk protected from falling objects and debris from a construction site or building façade renovations. In addition, about twenty-five percent of the Employer's business is comprised of erecting and dismantling scaffolding of which there are two types: pipe scaffolding and swing scaffolding. In either case, the purpose of the structure is to provide a safe working platform for building construction or renovation. Finally, the Employer occasionally provides a related service called "shoring" which stabilizes a building or a wall that might otherwise collapse during construction.

The Employer is a family owned and operated company. Peter O'Farrell is the president; Michael O'Farrell is the vice-president; and Diana O'Farrell is the secretary/treasurer. With respect to the daily operations, vice-president of operations Ali Hussain assigns crews of workmen to various sites throughout the five boroughs and

coordinates their activities. The record indicates that the work is seasonal and the nine jobs currently underway are typical for this time of year.

## **II. EMPLOYEE CLASSIFICATIONS**

With respect to assembling sidewalk bridges, the average crew is made up of three workmen – the foreman, a skilled laborer and an unskilled laborer. The foreman inspects the site, reviews the layout and marks where the legs of the bridge are to be placed on the sidewalk. The record demonstrates that while the foreman directs the work of the crew, he also works alongside them. The foreman or the skilled worker instructs the unskilled worker regarding specifically where to place materials on the sidewalk. According to Hussain, once the material is laid out and positioned properly, the skilled worker assists the foreman in assembling and securing the framework; whereas, the unskilled worker basically carries steel plank from the truck to the site. While this paradigm is generally true, Hussain conceded that all of the workers sometimes carry equipment from the truck.

When it comes to dismantling the sidewalk bridges, the crew is comprised of the foreman and either one skilled and one unskilled or two unskilled workers. The installation process requires a skilled worker, but dismantling the jobsite is merely a matter of pulling nails and hauling the equipment back to the truck.

With respect to pipe scaffolding, the crew is comprised of three or four workers: a foreman, one or two skilled and one unskilled worker. The foreman considers structural issues in deciding how the pipe scaffolding will be built. According to Hussain, the foreman and the skilled worker assemble the scaffold, while the unskilled worker remains on the ground tying rope to equipment which is pulled up to the level of scaffolding that is being constructed.

Swing scaffolding requires either a two or three person crew depending on the type of suspension used. Generally, swing scaffolding is suspended from either a roof

hook or a parapet clamp by two wire ropes. The platform is attached to a mechanical device, like a ratcheting system, so that the platform can be raised and lowered along the wire rope. Where the scaffolding is suspended by outrigger beams, however, an unskilled worker is also part of the crew in order to carry the equipment required to set up those beams. For crews consisting of two employees, the foreman and the skilled worker obviously carry all of the equipment before assembling the scaffolding.

Finally, depending on the size of the job, shoring could require a two or three person crew. According to Hussain, the skilled worker assists the foreman and the unskilled worker merely carries the equipment.

Two workers testified regarding the integrated nature of the work, especially as it relates to assembling sidewalk bridges which is the majority of the Employer's work. Patrice Benon, a skilled worker with about three years' experience, testified that all of the workers remove material from the truck and everyone assists in assembling the bridge. While most of the work involved with assembling sidewalk bridges is common sense, the foreman or the skilled worker teach unskilled employees how to perform specific tasks. Benon testified that the Employer's distinction between the workers on the ground and the workers on top of the scaffold was not necessarily based on skill level because the foreman may choose to stay on the ground and direct the other workers to climb on the scaffolding. While it appears that swing scaffolding is more dangerous to build and shoring is more structurally complicated work, Benon testified consistently that "everyone works everywhere." Essentially, the foreman decides the tasks based on skill level and whether he wants to climb.

Similarly, Anthony Delgado, a skilled worker who has been with the company for about two years, corroborated that all of the workers unload the truck and once the material is laid out, everyone assembles the framework. The foreman has discretion to assign a person to the truck, who is usually the least experienced member of the crew.

Delgado maintained that assembling sidewalk bridges entails largely repetitive tasks and expertise is gained through on-the-job training. The designated worker “on the ground” is not necessarily the least skilled employee. As an example, pipe scaffolding requires more technical expertise and is more dangerous to build than building sidewalk bridges, in part, due to the height of the scaffolding. The foreman determines who operates “the wheel” which transports material up to the workers on top of the scaffolding. Delgado explained that an inexperienced worker may not be the best choice to operate the wheel because if he is unable to control the speed, he may injure himself. Delgado also claimed that while some foremen prefer to climb, others prefer to work “the wheel.” Accordingly, the skill level of the worker who stays on the ground varies and assignments are discretionary with the foreman.

### **III. TERMS AND CONDITIONS OF EMPLOYMENT**

The record demonstrates that the foreman coordinates the field work and ensures that the equipment is installed safely and properly. In that regard, the foremen attend weekly safety meetings and subsequently relay that information to the crew at the job site. The foreman is also the Employer’s liaison with the customer at the site. The foremen call Hussain to get their assignment; whereupon, the foremen call the skilled and unskilled workers to inform them of the job location.

The foreman position requires approximately ten years experience. Currently, the Employer has nine foremen, each of whom earns \$40 per hour. The skilled workers have between two to five years experience and their hourly pay ranges from \$20 to \$30 per hour, depending on their level of experience. The unskilled workers are hired without any prior experience in the industry and earn about \$15 per hour. The Employer presently employs about eleven skilled workers and ten unskilled workers.

The skilled and unskilled employees work eight hour days, from 7:00 am to 3:30 pm. The foremen begin earlier, at about 6:00 am and sometimes work until 4:00 pm or

later depending on whether they are required to drive the truck back to the Employer's shop.

After one year with the Employer, all workers are eligible to participate in a 401(k) plan. They also receive health care benefits and a one-week paid vacation. After three years with the company, the employees are entitled to two-weeks paid vacations. Accordingly, employee benefits are determined by tenure with the Employer, regardless of employee classification.

With respect to tools, Hussain claimed that the foreman and the skilled workers carry the same tools - a level, tape, sockets, hammer, wrench and crow bar. The unskilled workers, however, carry a hammer, wrench and crow bar. According to Benon and Delgado, all of the workers carry the same tools, except the foreman also carries a skill saw and a level. Apparently, an Employer memo to all employees was included in their paychecks with a list of tools that the workers were required to own. This memo was not introduced as an exhibit.

With regard to special training, Hussain claimed that in order to become a skilled worker, the employee must be able to assemble parts on top of a scaffold and not be scared of heights.

Finally, the record demonstrates that the Employer's sign-in sheets list only two classifications of employees: foreman and laborer.

#### **IV. INDUSTRY PRACTICE**

Based on a conversation with a salesperson from one of the Employer's competitors, Hussain claimed that the industry practice dictates that the workers who are assembling the sidewalk bridge are represented by the Carpenters Union and the employees who are carrying equipment are represented by the Laborers Union. Hussain further claimed for the period from about 1984 to 1992, the Employer's unskilled workers were confined to all the work performed on the ground, which meant that they

essentially carried equipment back and forth from the truck and did not engage in any carpentry work.

To the contrary, Union business agent John Cavelli testified that twelve companies currently performing scaffolding and hoist work are signatories to contracts with the Carpenters Union. Under those contracts, the mechanics or journeymen classification would apply to the Employer's foremen and four levels of apprentices would reflect the different skill levels of the other workers. Accordingly, Cavelli maintained that all of the scaffolding work was carpenters' work, as contrasted with masonry or brick work which is performed by certain Locals within the Laborers union.

#### **V. PRIOR COLLECTIVE-BARGAINING AGREEMENTS**

The Employer's president Peter O'Farrell testified that the Employer had a collective-bargaining agreement with the Laborers union covering the unskilled workers and a collective-bargaining agreement with the Carpenters Union applicable to the skilled workers. The record is clear that the Employer does not have a current contract or bargaining relationship with either of these unions and that its prior relationship with the Carpenters Union ended more than a decade ago in about 1992.

The unsigned collective-bargaining agreement ("CBA") between the Employer and the Carpenters Union was effective by its terms from 1990 to 1993, and contained a seven-day Union security clause. Article II, Jurisdiction, Section 2, of the CBA provides that the agreement includes all employees performing "the building, erecting and dismantling of scaffolding and staging; all free-standing scaffolds shall be in accordance with the Decision of Record on Scaffolds rendered on April 28, 1920." This decision was not offered in evidence nor was any testimony adduced regarding the substance of the decision.

Further, Article II also specifies that work such as "the handling of lumber, fixtures, trim or other materials erected by Carpenters" is within its jurisdiction. Similarly,



“the operation of winches and jacks whether operated manually or operated mechanically by portable operating devices, used to handle material to be installed or erected by members of the [Union]” is carpenter’s work. Further, the contract states: “the handling, unpacking, distributing and hoisting of materials to be installed and/or erected by employees covered by the agreement shall be done by apprentices.”

With respect to the Mason Tenders’ District Council of Greater New York (Laborers Union), the Employer proffered an unsigned, independent collective-bargaining agreement which was effective by its terms from 1990 to 1993. The Employer also proffered a similar, unsigned agreement dated 1999-2002. Both contracts contain seven-day union security clauses.

In the 1990-1993 contract, Article IV, Work Included, states, in relevant part, that “if any party to this Trade Agreement erects or removes scaffolds and runways for the use of Bricklayers, Masons or Mason tenders, or any other employees on the jobsite, or erects or removes runways for the placing of concrete...or erects or removes planking on all scaffolds, Mason Tenders (Laborers) shall be used exclusively to perform said work.”

Similarly, the more recent 1999-2002 contract states that a signatory Employer shall exclusively employ Mason Tenders to “erect or remove scaffolds and runways for the use of Bricklayers, Masons or Mason Tenders, or any other employees on the job site, or erect or remove runways for the placing of concrete [in the foundations for masonry bearing walls] or erect or remove planking on all scaffolds.”

## **V. ANALYSIS**

### ***Appropriateness of the Bargaining Unit:***

Section 9(b) of the National Labor Relations Act directs the Board to “decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective

bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof....” “[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, ‘if not final, is rarely to be disturbed.’” *South Prairie Construction v. Operating Engineers, Local 627*, 425 U.S. 800, 805 (1976)(citation omitted). There is nothing in the Act that requires the unit for bargaining be the only appropriate unit or the most appropriate unit – the Act only requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenix Resort Corp.*, 308 NLRB 826 (1992). In defining the appropriate bargaining unit to ensure employees the fullest freedom in exercising the rights guaranteed by the Act, the key question is whether the employees share a sufficient community of interest. *Alois Box Co.*, 326 NLRB 1177 (1998); *Washington Palm, Inc.*, 314 NLRB 1122, 1127 (1994).

In determining whether employees share a sufficient community of interest to constitute an appropriate unit, the Board weighs various factors, including the similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the Employer’s other construction sites; and the extent of the parties’ bargaining history. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1998), citing *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). Also, the Board will consider a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of similar or dissimilar qualifications, training and skills; differences in job functions; amount of working time spent away from the facility; and integration of work functions. *Kalamazoo Paper Box Corp.* 136 NLRB 134, 137 (1962); *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647-648 (2d Cir. 1996).

It is clear that the unit petitioned-for herein would, upon application of the foregoing community of interest factors, be found to be an appropriate unit for collective bargaining, in the absence of any consideration of the history of collective bargaining. The record demonstrates that the petitioned-for unit constitutes a single employer unit consisting of employees who have common supervision, share the same terms and conditions of employment, and perform work as a crew in a fully integrated process. The Employer, however, claims that the petitioned-for unit is inappropriate because the scope of the historical bargaining units covered by the 8(f) collective-bargaining agreements splits the group between skilled and unskilled workers.

While the Board gives substantial weight to bargaining history in furtherance of the statutory objective of stability in industrial relations, I find no basis on the record for giving the bargaining history involved herein weight over the other community of interest factors that make the unit sought by the Petitioner otherwise appropriate. Here, the bargaining history is too remote to provide proper guidance. Further, the collective-bargaining agreements submitted in evidence define the work jurisdiction of the unions based on the kinds of functions performed by the workers. As the Board has explained, certifications are not granted to unions on the basis of specific work tasks or types of machines operated, but in terms of employee classifications performing related work functions under a community of interest analysis. *Ross-Meehan Foundries*, 147 NLRB 207 (1964); *Scrantonian Publishing Co.*, 215 NLRB 296, 298 fn. 9 (1974). Thus, to find that the unit sought by the Petitioner must under Section 9(b) of the Act be confined to the work jurisdictions under 8(f) agreement only serves to perpetuate arbitrary divisions of employees into separate units. Here, the foremen, skilled and unskilled laborers regularly perform the same tasks under the same terms and conditions of employment with common supervision and therefore, the record shows no rational basis exists for the

two historical units given the integration of the work. *A.C. Pavement Striping Company, Inc.*, 296 NLRB 206, 210 (1989); *Dezcon, Inc.*, 295 NLRB 109 (1989).

Finally, the Employer's contention that unskilled workers should be excluded from the unit of skilled workers and journeymen is inconsistent with Board precedent wherein craft units are defined as a distinct and homogenous unit of journeymen, apprentices and helpers. *Schaus Roofing and Mechanical Contractors*, 323 NLRB 781 (1997). Craft units typically include helpers or trainees who are not as skilled as the journeymen in the trade. *Dodge City of Wauwatosa, Inc.*, 282 NLRB 459 (1986). I find that the unskilled workers in the instant case perform the type of work that qualifies as apprentice-type work as contemplated in the Carpenters' collective-bargaining agreements submitted in evidence. In this regard, the unskilled workers perform tasks under the guidance of the foremen and the skilled workers for which they are required to provide their own tools.

In conclusion, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time sidewalk bridge and scaffold carpenters and erectors employed by the Employer, including the foremen, skilled and unskilled laborers;

Excluded: All office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

## Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.<sup>2</sup> Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>3</sup> Those eligible shall vote on whether or not they desire to be represented for

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<sup>2</sup> Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

<sup>3</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on

collective-bargaining purposes by the District Council for New York City and Vicinity  
United Brotherhood of Carpenters and Joiners of America.<sup>4</sup>

Date at New York, New York  
This May 24, 2006

/s/ \_\_\_\_\_  
Celeste J. Mattina  
Regional Director, Region 2  
National Labor Relations Board  
26 Federal Plaza, Room 3614  
New York, New York 10278

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or before **May 31, 2006**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

<sup>4</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **June 7, 2006**.